FEDERAL COURT OF AUSTRALIA

XSLJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 34

Appeal from:	*XSLJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1138
File number:	NSD 1092 of 2021
Judgment of:	**THAWLEY, CHEESEMAN AND O'SULLIVAN JJ**
Date of judgment:	28 February 2022
Date of publication of reasons:	11 March 2022
Catchwords:	**MIGRATION –** appeal from decision dismissing application for judicial review of decision of the Administrative Appeals Tribunal – where Tribunal affirmed decision of the delegate of Minister not to revoke mandatory cancellation of visa – whether primary judge erred in failing to find the Tribunal made findings for which there was no evidence – whether appellant had in fact made a submission forming an evidentiary basis for Tribunal's conclusion – whether primary judge erred in failing to find that the Tribunal acted on a misunderstanding of applicable law – whether primary judge erred in failing to find that the Tribunal's decision was infected by illogicality, irrationality or unreasonableness – whether Tribunal's assessment of appellant's risk of recidivism was illogical – appeal allowed on the basis that the Tribunal made material findings for which there was no basis in the material before it
Legislation:	*Migration Act 1958* (Cth) ss 499(1), 501(3A) Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction no. 79 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*
Cases cited:	*Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421; [2019] HCA 3 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 395 ALR 403; [2021] HCA 41 *MZAPC v Minister for Immigration and Border Protection*

	(2021) 95 ALJR 441; [2021] HCA 17 *XSLJ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 939
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	52
Date of hearing:	28 February 2022
Counsel for the Appellant:	Mr D Hooke SC (written submissions) and Dr J Donnelly (written submissions and oral argument)
Solicitor for the Appellant:	Zafiri Lawyers
Counsel for the First Respondent:	Mr G Johnson
Solicitor for the First Respondent:	Minter Ellison
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice save as to costs

ORDERS

NSD 1092 of 2021

BETWEEN:	**XSLJ** Appellant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY:	**THAWLEY, CHEESEMAN AND O'SULLIVAN JJ**
DATE OF ORDER:	**28 FEBRUARY 2022**

THE COURT ORDERS THAT:

(1) The appeal be allowed.

(2) The orders of the primary judge be set aside and in lieu thereof:

   (a) a writ of certiorari issue quashing the decision of the second respondent of 14 April 2021;

   (b) remit the matter to the second respondent, differently constituted, for determination according to law;

   (c) the first respondent pay the applicant's costs as agreed or assessed.

(3) The first respondent pay the appellant's costs of the appeal as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

Ex tempore

(Revised from transcript)

THE COURT:

OVERVIEW

1 The appellant is a New Zealand citizen who came to Australia on 13 December 2003 aged 24. On 10 August 2018, a delegate of the Minister cancelled the appellant's Class TY Subclass 444 Special Category (Temporary) visa under s 501(3A) of the *Migration Act 1958* (Cth) (the **Act**). This was because the delegate was satisfied that the appellant had a substantial criminal record and that he was serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

2 The appellant made representations to the Minister seeking revocation of the cancellation of his visa. On 21 January 2020, a delegate of the Minister refused to revoke the visa cancellation.

3 The appellant sought review of that decision in the Tribunal. The Tribunal affirmed the delegate's decision on 14 April 2020. The Tribunal's decision was quashed on judicial review and a writ of mandamus was issued pursuant to orders made by this Court in its original jurisdiction.

4 The Tribunal conducted a second hearing on 22 and 23 February 2021. The parties relied upon new statements of facts issues and contentions (**SFICs**) for the second Tribunal hearing. On 14 April 2021 the Tribunal again affirmed the decision under review: *XSLJ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 939 (hereafter "**T**").

5 The appellant again brought judicial review proceedings in this Court, advancing four grounds of review. Each ground was rejected by the primary judge. The appellant now appeals from the primary judge's order dismissing his application: *XSLJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1138 (hereafter "**J**"). The appellant contends the primary judge erred in connection with three of the four grounds argued.

6 The background is comprehensively set out by the primary judge at J[4] to [65]. It is unnecessary to repeat it here. It is also unnecessary to summarise the decisions of the Tribunal and the primary judge. Reference is made to those decisions to the extent necessary to address the grounds of appeal.

7 For the reasons which follow, Ground 1 of the appeal is made out. The primary judge ought to have found jurisdictional error on the part of the Tribunal on the basis that it made material findings which were not open on the material before it. Grounds 2 and 3 are not made out.

GROUND 1

8 The appellant contends that the primary judge erred in failing to find that the Tribunal made findings for which there was no evidence. Ground 1 revolves around the Tribunal's reasons at T[112] to [114] (appellant's emphasis):

> [112] The prospect of a future visa cancellation proceeding arising from any further offending is also contended to represent a "*significant deterrent against the Applicant engaging in future criminality* [...]" The main point seems to be that the difficulties he has faced with the current attack on his visa status has, in itself, had a deterrent effect on his future risk of recidivism.
>
> [113] To properly assess any weight attributable to this contention, it is first necessary to understand the context in which it is made. The Applicant now claims to have experienced some sort of shock or epiphany arising from the reality that his visa may be cancelled if he continues to engage in criminal conduct in Australia or elsewhere. [Footnote: See, eg, T1, 784, [34]; See also, Transcript, 23 February 2021, page 14, lines 45–47; page 15, lines 1–5.] **He seems to contend that the lack of any previous formal warning about this possible adverse impact on his visa status will somehow act as a deterrent against future offending. Looking at his history of offending, it is very difficult to discern how any asserted failure by others to warn him about adverse outcomes arising from his sustained unlawful conduct is somehow explanatory of that conduct**. The Applicant cannot now be heard to say: *"well if I knew that my continued offending would threaten my visa status to remain here, I would have stopped offending."*
>
> [114] The harsh reality to be taken from the Applicant's offending history is that it has resulted in harm and dreadful outcomes for his children and the broader Australian community. **His purported attribution of blame for his offending on others apparently failing to warn him about the consequences of his offending is, in and of itself, indicative of a failure to take responsibility for his past offending**.

9 The Tribunal's findings include that:

(a) the appellant contended that the lack of any previous formal warning about the possible adverse impact of continued offending on his visa status would act as a deterrent against future offending: T[113];

(b) the appellant contended that a failure of others to warn him about adverse outcomes was explanatory of his sustained unlawful conduct: T[113];

(c) the appellant blamed his offending on the failure of others to warn him about the consequences of his offending: T[114]; and

(d) this attribution of blame on others indicated a failure to take responsibility for his past offending: T[114].

10 The material relied upon by the Tribunal for these conclusions and findings was referred to in the footnote in T[113]. The reference to "T1, 784, [34]" is a reference to the SFIC in the first Tribunal proceedings, which in relation to "nature and seriousness of the conduct" stated:

> [34] The applicant was never formally warned that his Australian visa might be cancelled if he continued to engage in criminal conduct in Australia or elsewhere.

11 Three observations should be made about this:

(1) First, although this SFIC was before the second Tribunal, the parties had filed and relied upon new SFICs for the purposes of the second Tribunal hearing. No reliance was placed by the appellant on his first SFIC either generally or in relation to the specific statement at [34]. It was the appellant's second SFIC which identified, so far as he was concerned, the facts, issues and contentions the subject of the second Tribunal's review. Indeed, T[113] and [114] are located under the heading: "The Applicant's SFIC – this remittal hearing".

(2) Secondly, immediately after [34], the first SFIC proceeded to address the risks to the Australian community and the appellant's prospect of re-offending. No statement such as that found at [34] of the first SFIC was made in the second SFIC in connection with these issues.

(3) Thirdly, [34] of the first SFIC does not, of itself, supply an evidentiary or other basis for the findings made by the Tribunal at T[113] and [114], summarised at [9] above.

12 The references in the footnote at T[113] to "Transcript, 23 February 2021, page 14, lines 45–47; page 15, lines 1–5" are to the following portions of transcript of submissions made by the appellant's counsel to the second Tribunal:

> There is another significant difference of course now that did not occur in the past and that, of course, is that the applicant's visa has been cancelled. The first time such an extraordinary executive act has taken place and in my respectful submission it has had a massive impact on the applicant's life and his mind set as to where he is best - where

> he wishes to go forward in the future and the applicant has been before this learned tribunal not once, but twice, of course, the Federal Court of Australia and back again. So the applicant's recent experiences itself have acted as a deterrent against the applicant reoffending.

13 Although not referred to by the Tribunal in the footnote, immediately after the submissions just set out, counsel for the appellant went on to say:

> Of course, the applicant also appreciates that if he were to get back his visa and if he were to reoffend then there would be a very real prospect that his visa will be cancelled, so the prospect of future visa cancellation itself is a significant deterrent against the applicant reoffending.

14 These submissions reflected [59] of the appellant's second SFIC:

> Further, the prospect of future visa cancellation will act as a significant deterrent against the Applicant engaging in future criminality in Australia. Moreover, the Applicant has learned a great deal going through visa cancellation and a lengthy stay in immigration detention (not something he has had to deal with before).

15 Two observations should be made about these submissions:

(1) First, the substance of the submission is accurately reflected in the Tribunal's summary at T[112], namely the prospect of visa cancellation itself had a deterrent effect against future criminal conduct.

(2) Secondly, the conclusions drawn by the Tribunal at T[113] and [114], summarised at [9] above, are not capable of being drawn from the submissions advanced on the appellant's behalf.

16 The statement at [34] of the first SFIC was referred to by the parties and the primary judge as the "warning contention submission". The appellant contended before the primary judge that he had not made the warning contention submission. Rather, all the appellant had contended was that the prospect of future visa cancellation would act as a significant deterrent against him engaging in future criminality in Australia. The appellant contended that there was no evidentiary basis for the findings made by the Tribunal summarised at [9] above.

17 The primary judge stated:

> [107] The Tribunal at [113] was seeking to assess the weight it could give to the applicant's contention that the prospect of a future visa cancellation would operate as a significant deterrent against him engaging in any future criminality. The Tribunal approached the task by considering whether the lack of any prior formal warning about an adverse impact on his visa status could explain the applicant's "sustained unlawful conduct". At [113] the Tribunal observed that the applicant "seems to contend" that the lack of any prior formal warning would act as a deterrent against future offending and then at [114]

states that the applicant's "purported attribution of blame for his offending on others apparently failing to warn him about the consequences of his offending" is indicative of a failure to take responsibility for that offending.

[108] The Minister sought to rely upon a submission purportedly made by the applicant that he "was never formally warned that his Australian visa might be cancelled if he continued to engage in criminal conduct in Australia or elsewhere" to support the observation made by the Tribunal at [114] that the applicant had not accepted responsibility for his offending (**warning contention submission**).

[109] The applicant submitted in relation to the warning contention submission that:

(a) it was a submission made in the applicant's statement of facts, issues and contentions in an earlier proceeding before the Tribunal, which was not relied upon by the applicant in the decision of the Tribunal that is the subject of this proceeding;

(b) it was made by the applicant's previous counsel and did not constitute evidence; and

(c) the analysis by the Tribunal at [112]-[114] was undertaken by reference to the applicant's oral evidence before it, not by reference to the material from the earlier Tribunal hearing.

[110] It is not necessary to resolve that dispute. If the warning contention submission was advanced, there would be an evidentiary basis for the warning contention submission and hence the no evidence submission must fail.

[111] If the warning contention submission was not advanced, I do not consider that the "failure to take responsibility for his past offending" conclusion by the Tribunal on the submission could constitute jurisdictional error. This is because I do not accept that this conclusion was a precondition to the exercise of jurisdiction, nor was it a "critical step" in the Tribunal's reasoning. The Tribunal made no subsequent reference to the characterisation in its decision and it did not form a necessary link or premise to any of the Tribunal's other findings.

[112] In the circumstances, I am satisfied that there was either an evidentiary basis for the warning contention submission or, if there was no evidentiary basis for the warning contention submission, it was not a precondition to the exercise of jurisdiction or critical step in the reasoning of the Tribunal. Regardless, I am not satisfied there was a realistic possibility that the decision of the Tribunal could have been different if the Tribunal had not characterised the warning contention as "indicative of a failure" by the applicant "to take responsibility for his past offending" for the reasons stated above.

18 The appellant attacked this reasoning at several levels.

19 First, the appellant contended that the primary judge's conclusion that "there was … an evidentiary basis for the warning contention submission" (at J[112]) was irreconcilable with the conclusion (at J[110]) that it was "not necessary to resolve" whether the warning contention submission was advanced.

20 As to this contention:

(a) The primary judge's reasoning was that, even if the "warning contention submission" was not made, the error on the part of the Tribunal was immaterial to its reasoning and not jurisdictional. It was therefore unnecessary to make a finding about whether or not the "warning contention submission" was made.

(b) If the primary judge is to be understood (inconsistently with the first sentence of J[110]) as positively concluding at J[112] that "there was … an evidentiary basis for the warning contention submission" the basis for that conclusion is not identified. No basis for the conclusion was identified on appeal apart from [34] of the appellant's first SFIC and the oral submissions made at the hearing on the appellant's behalf.

21 The second aspect of the appellant's attack concerns the primary judge's treatment of the Minister's reliance on the warning contention submission, namely [34] of the first SFIC. The Minister contended that this "submission" supported the Tribunal's conclusion at T[114] that the appellant had not accepted responsibility for his past offending. The appellant argued before the primary judge that [34] of the first SFIC was not relied upon. The appellant had filed a second SFIC for the second Tribunal proceeding and was represented by different counsel. The first SFIC was not referred to by the appellant or the Minister or the Tribunal at the hearing. It was referred to by the Tribunal after the hearing in the footnote in T[113] of the reasons for decision. The lack of any reference to the first SFIC was only to be expected, the appellant submitted, because the appellant's statement of relevant facts for the purposes of the review and his identification of the issues and his contentions were contained in the second SFIC. The appellant also contended that, in any event, [34] of the first SFIC was not evidence.

22 As to these contentions, the case which the appellant put at the second Tribunal hearing was that the prospect of future visa cancellation would act as a significant deterrent against him engaging in future criminality in Australia: T[112]. The appellant did not contend that a lack of previous formal warning would act as a deterrent against further offending. The appellant did not seek to explain his past offending by reference to a lack of a formal warning. The appellant did not blame others for his past offending. The only material referred to on appeal, from which the Tribunal's conclusions at T[113] and [114] could have been drawn, was [34] contained in the first SFIC and the submissions which had been put at the second Tribunal hearing. It was permissible for the Tribunal to have regard to what had gone before, but the second Tribunal could not in the circumstances and acting within the confines of conducting a legally reasonable review, form the conclusions at T[113] and T[114] (summarised at [9] above) on the basis of [34] of the first SFIC and the submissions made at the second Tribunal

hearing. The circumstances included that the second Tribunal hearing was conducted afresh, with new SFICs, with the appellant giving evidence orally and being cross-examined. No basis for the Tribunal's conclusions at T[113] and [114] was identified on appeal apart from [34] of the first SFIC and the submissions advanced on the appellant's behalf before the second Tribunal.

23 The appellant's third attack concerned the primary judge's reasoning at J[111] to the effect that, if there was no evidentiary basis for the Tribunal's conclusion that the appellant failed to take responsibility for his actions (drawn from the "warning contention submission"): (a) the Tribunal's conclusion in that respect was not "a precondition to the exercise of jurisdiction"; and (b) in any event, the conclusion was not a "critical step" in the Tribunal's reasoning. As to (b), the primary judge stated that the Tribunal made no subsequent reference to the "characterisation" (the appellant failing to take responsibility for his actions) in its decision and concluded that the Tribunal's finding did not form a necessary link to any of the Tribunal's other findings.

24 As the appellant submitted, the Tribunal did rely on its conclusion that the appellant had tried to blame his conduct on the lack of a warning. At T[175], under the heading "Findings about recidivism", the Tribunal identified a number of positive factors suggestive of a low-medium risk of recidivism. At T[177], the Tribunal then listed a number of matters which it considered "convincingly challenged" the positive factors. The Tribunal stated (emphasis added):

> [177] Further, the positive factors are, to my mind, convincingly challenged by the following *"negative factors"*:
>
> …
>
> (d) **while he contends that he has insight about the effects of his illicit drug use and the state of his mental health, he nevertheless has sought to level some measure of blame upon others for his unlawful activity because those others apparently failed to warn him about its adverse impact on his visa status** and, further, that he and he alone will form a view about whether his depressive symptoms become *"a problem"* in his life; …
>
> [178] Weighing the *"positive factors"* against the *"negative factors"* identified above, I am not satisfied that this Applicant represents a low risk of recidivism. Having regard to the totality of the evidence and my findings thereon, I am of the view that his risk of recidivism ranges from (1) at best, low-moderate; and (2), more likely, a risk of re-offending that is now little or no different than what it was at the time of his most recent removal from the Australian community.

25 The Tribunal's conclusions at T[113] and [114], including that the appellant blamed his offending in part on the lack of a warning, was material to the Tribunal's assessment of the risk that the appellant posed to the Australian community. The Tribunal's assessment of the risk of recidivism, at T[178], was then also relied upon in connection with the Tribunal's assessment of the expectations of the Australian community: at T[310], [325(e)].

26 The submission which the appellant had actually made was that that the prospect of a future visa cancellation itself represented a significant deterrent against the appellant engaging in future criminality: T[112]. The reasoning at T[113] and [114] does not directly address this submission. Rather, T[113] and [114] sets out an asserted factual "context" for assessment of the submission which the appellant made. The Tribunal's findings at T[113] and [114], identifying that asserted "context", were not open on the material before the Tribunal. The Tribunal breached an implied condition of its decision-making authority by making critical findings which were not reasonably open on the material before it, or drawing inferences from material which was not reasonably capable of supporting such inferences, in circumstances where the findings or inferences were ones which required at least some evidence or supporting material. The findings or inferences could not be characterised as findings within the Tribunal's "personal or specialised knowledge" or as "commonly known": *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 395 ALR 403; [2021] HCA 41 at [17], [24] and [28]. The conclusions reached by the Tribunal at T[113] and [114] were significant and adverse to the appellant. They formed an important part of the Tribunal's reasoning process. If the Tribunal had not breached the implied condition, the conclusions at T[113] and [114] would not have been reached, and there is a realistic possibility that the outcome could have been different: *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421; [2019] HCA 3 at [2], [45]; ***MZAPC** v Minister for Immigration and Border Protection* (2021) 95 ALJR 441; [2021] HCA 17 at [39]. The breach of the implied condition was therefore material. The appellant therefore established jurisdictional error: *MZAPC* at [1] to [3], [29] to [32].

27 The primary judge ought to have concluded that the appellant had discharged his onus of demonstrating jurisdictional error on the part of the Tribunal.

28 Ground 1 should be upheld.

GROUND 2

29 By Ground 2, the appellant contended that the primary judge erred in failing to find that the Tribunal acted on a misunderstanding of the applicable law. The alleged misunderstanding was as to the operation of cl 14.2 of Direction 79 given by the Minister pursuant to s 499(1) of the Act (the **Direction**), which provides:

> **14.2 Strength, nature and duration of ties**
>
> (1) The strength, nature and duration of ties to Australia. Reflecting the principles at 6.3, decision-makers must have regard to:
>
> (a) How long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child, noting that:
>
> (i) less weight should be given where the non-citizen began offending soon after arriving in Australia; and
>
> (ii) More weight should be given to time the non-citizen has spent contributing positively to the Australian community.

30 The Tribunal stated:

> [331] The Applicant first came to Australia in December 2003 aged 24 years. He commenced offending in Australia in August 2006, under three years later. Having regard to 14.2(1)(a)(i) of the Direction, it is safe to find the Applicant did begin offending *"soon after arriving in Australia"*. Until removed from the Australian community in August 2016, he had spent something like 10–15 years in that community. He offended less than three years after his arrival. Accordingly, no weight can be allocated in favour [of] the Applicant on the basis of paragraph 14.2(1)(a)(i).
>
> [332] Some measure of weight may be allocable in favour of the Applicant via an application of paragraph 14.2(1)(a)(ii). This is on the basis that he has spent at least some time in Australia contributing positively to the Australian community. I have found that he has a modest history of remunerative employment in this country. I have also found that he has made modest contributions to the Australian community via his positive activities in immigration detention. As against that I have also found that he has spent something like seven years in custody/detention and that he has not engaged in remunerative employment since 2010. Applying the terms of paragraph 14.2(1)(a)(ii) of the Direction as favourably towards the Applicant as I can, I will find that he has made some measure of cumulative positive contributions to the Australian community. That said, only a slight measure of weight is allocable to him pursuant to this sub-paragraph 14.2(1)(a)(ii).

31 Before the primary judge, the appellant argued that the Tribunal's statement that "no weight can be allocated in favour of the [a]pplicant on the basis of paragraph 14.2(1)(a)(i)" revealed an error of law. The appellant argued that the Tribunal incorrectly proceeded on the basis that, as a result of its findings about the timing of offending after arriving in Australia, the Tribunal was required to give "no weight" to the matter in cl 14.2(1)(a) by reason of cl 14.2(1)(a)(i) of

Direction 79. The operation of cl 14.2(1)(a)(i) was that less weight, not "no weight", should be given to the matter in cl 14.2(1)(a) where the non-citizen began offending soon after arriving in Australia.

32 The primary judge stated:

> [148] It is important to observe at the outset that the question of "less weight" in subparagraph (i) is a reference to "less weight" being given to the factor identified in cl 14.2(1)(a). The factor in cl 14.2(1)(a), in turn, is a factor that must be taken into account in determining the weight to be given to the "strength, nature and duration of ties to Australia" consideration in cl 14.2(1) of Direction 79. Hence if the non-citizen began offending soon after arriving in Australia then it would follow that less weight should be given to the "how long the non-citizen had resided in Australia" factor in cl 14.2(1)(a).
>
> …
>
> [151] There is a certain degree of imprecision in the manner in which the Tribunal expressed its reasoning in this regard. Read literally, the Tribunal appears to have been focusing on the weight it was giving to the two matters identified in the two subparagraphs to cl 14.2(1)(a), rather than the impact of those two matters on the weight it was to give to the consideration in cl 14.2(1)(a).

33 The primary judge was not satisfied that the Tribunal made the alleged error, stating:

> [152] The reference by the Tribunal to the allocation of "no weight" being able to be allocated "in favour" of the applicant with respect to cl 14.2(1)(a)(i) is in substance, if not in form, relevantly a finding that this factor would not favour the applicant in assessing the weight to be given to the "length of residence in Australia" factor in cl 14.2(1)(a).
>
> [153] For the reasons outlined above, I am not satisfied that the Tribunal made the alleged error in [331] of its decision. The alleged error proceeds on a misapprehension as to the *matter* to be given less weight.

34 The Tribunal's reasons must be read fairly and as a whole. The primary judge correctly observed that the language used by the Tribunal was imprecise. Acknowledging that what follows does not accord with the literal meaning of what the Tribunal said, the better understanding of what the Tribunal intended to convey is as follows:

(a) the appellant had begun offending soon after arriving in Australia and, accordingly, the terms of cl 14.2(1)(a)(i) were engaged;

(b) cl 14.2(1)(a)(i) was of no benefit to the appellant in the sense that the clause only operated to reduce the amount of weight which would be given to the consideration in cl 14.2(1)(a), namely "[h]ow long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child";

(c) the appellant had spent some time contributing positively to the Australian community such that the terms of cl 14.2(1)(a)(ii) were engaged;

(d) in considering "[h]ow long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child", cl 14.2(1)(a)(ii) operated such that more weight should be given to the time the appellant spent contributing positively to the Australian community;

(e) attributing more weight to the time the appellant spent in Australia contributing positively to the Australian community, but recognising that the appellant had spent about seven years in custody or detention and that he had not engaged in remunerative employment since 2010, the consideration in cl 14.2(1)(a) of "[h]ow long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child" operated to some extent in the appellant's favour.

35 So understood, the Tribunal's reasons in this respect do not reveal jurisdictional error. It follows that Ground 2 of the appeal has not been made out.

GROUND 3

36 Finally, by Ground 3, the appellant contends that the primary judge erred in failing to find that the Tribunal's decision was infected by illogicality, irrationality or unreasonableness. This contention is made with respect to two aspects of the Tribunal's reasons: (a) the risk of recidivism; and (b) the appellant's state of health. It is convenient to address them separately.

Risk of recidivism

37 As noted earlier, at T[178], the Tribunal concluded:

> [178] Weighing the *"positive factors"* against the *"negative factors"* identified above, I am not satisfied that this Applicant represents a low risk of recidivism. Having regard to the totality of the evidence and my findings thereon, I am of the view that his risk of recidivism ranges from (1) at best, low-moderate; and (2), more likely, a risk of re-offending that is now little or no different than what it was at the time of his most recent removal from the Australian community.

38 Before the primary judge, the appellant contended that the Tribunal did no more than speculate that the appellant's risk of recidivism was low-moderate or otherwise what it was when the appellant was most recently removed from the Australian community (without stating what that latter risk of recidivism was said to be).

39 The appellant contended that it was illogical to reason that the appellant was a low-moderate risk of recidivism and then otherwise reason that the appellant was likely a high risk of recidivism (assuming that the appellant was a high risk of recidivism when he was last removed from the Australian community – which the Tribunal did not make clear). The appellant contended that the recidivism assessment undertaken by the Tribunal was not reasonably mandated by cl 13.1.2(1)(b) of the Direction. The appellant argued:

> Although it may be accepted that the Tribunal could characterise a non-citizen's risk of reoffending by reference to a range, it is difficult to reconcile (considered logically and rationally) that a non-citizen posed a low to moderate risk [of] offending [again] but then otherwise reason that the applicant posed a high risk of reoffending. Such reasoning is unlawful.

40 The primary judge concluded:

> [165] [T]he Tribunal was not expressing two ranges, but rather a single range. It was a range from "low-moderate" to "a risk of reoffending that is now little or no different than that when it was the time of his most recent removal from the Australian community". That it was a single range is clear from the insertion of the word "from" immediately prior to (1) and the insertion of "; and" immediately prior to (2).

41 The primary judge's conclusion in this respect must be accepted.

42 On appeal, the appellant submitted that, regardless of whether the Tribunal was referring to one range or two ranges, it is "neither logical nor rational that a non-citizen could be assessed as potentially a low-moderate risk of recidivism but otherwise represent a high risk of re-offending". The appellant submitted that the "illogicality is with the broad scope of the range found by the Tribunal".

43 This submission must be rejected. It was permissible to conclude that the risk of recidivism fell within a broad range. The assessment is after all necessarily one about future events. The Tribunal identified in some detail the evidence concerning the risk of re-offending: T[124]-[174]. It then identified various "positive" and "negative" factors relevant to its analysis of risk: T[175]-[177]. The Tribunal's conclusions at [178] and [179], arrived at through this analysis, were not illogical.

Appellant's state of health

44 This aspect of Ground 3 focusses upon the Tribunal's reasons at T[347]. The Tribunal stated (formatting and typographical errors from original; footnotes omitted):

> [347] In his PCF, the Applicant responded by ticking the "No" box in response to the question "***Do you have any diagnosed medical or psychological conditions?***".

> The Applicant can thus be safely found to be a relatively young man in a good state of health. Further in his PCF, the Applicant ticked the "Yes" box in response to the question "***Do you have any concerns or fears about what would happen to you on return to your country of citizenship?***" He provided the following details:
>
> > "*Returning to New Zealand puts my life at great risk from past acquantainces and my ex-step father. My return to New Zealand would also put my sister [redacted] at risk and [Mr R B]'s life at great risk. Threats of Murder have been made from [my sister's] ex-partner with whom she was in a domestically violent relationship (corroborated by an AVO in NZ)*"

45 Before the primary judge, the appellant attacked the Tribunal's conclusion that the appellant "can thus be safely found to be a relatively young man in a good state of health" for the purposes of cl 14.5(1)(a) of Direction 79. The appellant contended that the Tribunal's conclusion was illogical in circumstances where the Tribunal had earlier concluded (at T[135]) that the appellant: had difficulties with illicit substances across a long period; should engage in an ongoing regime of psychological/psychiatric review such that he satisfactorily deals with the emotional pain arising from his childhood trauma; and had psychological symptoms.

46 The primary judge stated:

> 169 It is important to understand the context in which these two findings were made by the Tribunal.
>
> 170 The basis for the finding by the Tribunal that the applicant was in a good state of health was the applicant's own admission of good health in his Personal Circumstances Form. The applicant ticked the "No" box in response to the question "Do you have any diagnosed medical or psychological conditions?". The finding was made in the context of the Tribunal's consideration of potential impediments that had been identified by the applicant to his removal to New Zealand. Those impediments included that if he was returned to New Zealand, his "many bad memories" of New Zealand were "likely to be bad for [his] mental health and well-being".
>
> 171 The Tribunal's finding with respect to the applicant's ongoing regime of mental health review was made in the context of the Tribunal's consideration of the risk of recidivism by the applicant. At [135] the Tribunal stated:
>
> > It is, to my mind, a matter of concern that the Applicant addresses Dr Nielssen's observation that the Applicant may be at increased risk of developing depression simply on the basis that he does not think "*that it's a problem to be honest*". With due respect to the Applicant, this is not necessarily an analysis that can be safely made by him alone. His difficulties with illicit substances across a long period of time and its causative effects beyond his very significant offending history, to my mind, mandate that he must engage in an on-going regime of psychological/psychiatric review such that he satisfactorily deals with the emotional pain arising from his childhood trauma. It is equally a matter of concern (for the purposes of his risk of recidivism) that if he alone thinks his psychological symptoms are causing him difficulty,

> only then will he "*reach out and talk with [Ms Ardren]*". This self-regulation of his symptomatology does not bode well for his risk of recidivism.
>
> (Original emphasis.)

172 I do not accept that the "good health" finding and the "ongoing regime of mental health review" finding established that the decision of the Tribunal was illogical, irrational and/or unreasonable.

173 *First*, finding that a person was in good health consistently with their own statement to that effect is not necessarily inconsistent with a finding that the applicant should engage in psychiatric or psychological treatment for past issues in order to remain at a lower risk of reoffending.

174 *Second*, as to materiality, the Tribunal in the context of assessing impediments to the removal of the applicant expressly addressed the mental health issues raised by the applicant in the context of that consideration, notwithstanding its finding about the applicant's "good state of health". The Tribunal found at [352]:

> [T]o the extent that a return to New Zealand may cause him any mental distress and/or anguish in terms of the difficult childhood he experienced there, he will have access to the same (or nearly the same) level of community mental health support that is currently available to him in Australia. Put simply, he will be entitled to mental health support to the same standard as that available to other New Zealand citizens.

47 On appeal, the appellant submitted that the appellant's statement, in his Personal Circumstances Form, that he was in a good state of health was "neither here nor there, given the Tribunal's own findings". At [177(f)], the Tribunal stated it was not convinced that the appellant had undertaken sufficient rehabilitation to address his substance use and abstinence problems (clearly being health issues). The appellant submitted that, regardless of what the appellant claimed, an unarticulated claim or issue might "clearly emerge" from a decision-maker's own findings and the material before them upon which the findings are reached.

48 The appellant's submissions in this respect proceed upon an overly technical construction of particular aspects of the Tribunal's reasons. The Tribunal accepted that the appellant had had difficulties with drug abuse over time, that he needed some psychiatric or psychological review, and that he had "psychological symptoms": T[135]. The Tribunal also concluded that the appellant was a "relatively young man in a good state of health": T[347]. Those conclusions must be read together and fairly: the appellant, a relatively young man in a good state of health, had various mental health issues in the past some of which remained unresolved. The appellant had accepted he was of good health in his Personal Circumstances Form. The Tribunal accepted his claim in that respect, but concluded that the appellant had some psychological issues that required ongoing support. The Tribunal did not conclude that these ongoing mental

health issues were such that the appellant was properly described as being in poor health. The Tribunal's conclusions were not attended by error.

49 The appellant also attacked the primary judge's conclusions with respect to materiality at J[174]. The appellant submitted that the Tribunal expressly addressed the mental health issues raised by the appellant, but did not address the appellant's substance use and abstinence problems which were a separate health issue which the Tribunal held against the appellant when considering the appellant's risk of recidivism at T[177(f)]. The appellant submitted that "the Tribunal provided no analysis of the appellant's apparent unresolved substance use issues when considering the other consideration of the extent of impediments if removed or whether the appellant's health issues would impede his employment prospects if removed".

50 This submission must be rejected. The Tribunal took the appellant's mental health issues into account, including his substance use and abstinence problems, in the context of the extent of impediments to the appellant's return. The Tribunal stated:

> [354] I have earlier sought to address the evidence relating to the Applicant's psychological symptomatology. To the extent that he may require such further treatment and/or consultations in New Zealand, it is safe to find that these facilities and services will be available to him in that country to the same extent that they are available to other citizens of that country [Footnote: Direction, paragraph 14.5(1)(a)]. Similarly, he will be able to access any additional medical care, treatment and governmental support in New Zealand at or about the same (or very nearly the same) level as available to him in Australia. Put simply, he will have access to those medical and other social and economic supports in New Zealand in the context of what is generally available to other citizens of that country [Footnote: Direction, paragraph 14.5(1)(c)].

51 Read in the context of the reasons as a whole, these observations are not confined to the mental health issues raised by the appellant. These observations are also directed to the Tribunal's conclusions with respect to the appellant's substance use and abstinence problems. Accordingly, Ground 3 is not made out.

CONCLUSION

52 The appeal should be allowed.

I certify that the preceding fifty-two (52) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Thawley, Cheeseman and O'Sullivan.

Associate:

Dated: 11 March 2022